"(3) That the question of damages, if any, as to the plaintiffs in each of the above-entitled cases shall be tried separately, by separate juries where demanded, unless waived, unless one or more of said plaintiffs consent to a consolidation for trial on that issue, . . ." [R. 368-377.]

At United's request, the district court included in the order the following statement:

". . . the court is of the opinion that this Order involves a controlling question of law, as defined in 28 U. S. C. A. 1292(b), as to which there is a substantial ground for differences of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of the litigation." [R. 377.]

After obtaining permission from the court of appeals as required by 28 U. S. C. §1292(b) [R. 388], United appealed the order of consolidation. [R. 378.] The court of appeals ordered that the appeals in all of the cases be consolidated. [R. 389.]

United opposed the consolidation by the trial court only because it provided for separate jury trials on the issue of damages. [R. 341-348, 352.]

In its brief to the court of appeals, United contended, among other things, that the plaintiffs were either demanding or were in a position to demand exemplary damages, and that the issues of liability and damages were so interrelated as to require that a single jury hear the evidence on both issues. However, in their brief to

the court of appeals, the petitioners stated (p. 15 fn. 8) that many of them "would be willing to waive their claims for exemplary damages. . . ."[1]

The opinion of the court (Appx. A) discusses primarily the problems created by claims for exemplary damages and then concludes: "We do hold that under the circumstances presented by this appeal the issues of liability and damages, exemplary *or normal,* are not so distinct and separable that a separate trial of the damage issues may be had without injustice." (Emphasis added.)[2]

In the petition for rehearing filed by petitioners herein the court was advised (p. 2) that all claims for exemplary or punitive damages were being disavowed by all of the petitioners in all twenty-three cases and asked for specific consideration of the issue of separate trials on liability and on "normal" damages. The reply of

---

[1]The full text reads as follows:

"Although it is the position of appellees that the court order should be affirmed in its present form, many of the appellees have indicated that they have no present intentions of claiming exemplary damages and that they would be willing to waive their claims for exemplary damages as a condition of approval of the court's order if that be necessary. In making this statement appellees wish to make it clear that they have no intention of retreating from their position that as a matter of law the order of the court below should be sustained as is."

[2]Nowhere does the court in its opinion point out any "circumstances" which tend to merge the issues of compensatory damages and liability in such a way as to render separate trials on these two issues unjust.

United pointed to the court's reference in its opinion to "normal" damages in the language cited above. The petition for rehearing was denied, without opinion.

Since then each of the petitioners has filed in the district court a "Statement Re Limitation of Claim for Damages" stating as to each petitioner that he ". . . hereby limits his claim for damages in the above entitled matter to pecuniary damages, general and special. Plaintiff makes no claim for exemplary or punitive damages."[3]

Accordingly, the issue as it relates to exemplary damages is not here involved; the sole question presented by this petition is whether a district court in the exercise of its discretion may consolidate on the issue of liability cases seeking only compensatory damages for wrongful death, leaving the issue of damages to be tried separately in each case.

---

[3]The clerk of the district court is being requested to forward for the record herein certified copies of said statements.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Has Decided an Important Question of Federal Procedure in a Way in Conflict With the Applicable Decision of This Court.

The decision of the court of appeals that the issue of liability cannot be separate from the issue of compensatory damages in these wrongful death actions is in conflict with this Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 495. In the *Gasoline Products* case, this Court held that the Seventh Amendment's guarantee of a right to a trial by jury does not "exact the retention of old forms of procedure" and accordingly, does not require all issues in a civil case to be tried before the same jury.[4] If the issues are "clearly separable," the Court said, they may be tried separately. *Id.* at 499. If, however, the issues are so interwoven that one cannot be submitted to the jury independently of the other "without confusion and uncertainty, which would amount to a denial of a fair trial," the issues must be tried together. *Id.* at 500.

---

[4]See also, *Baltimore & Carolina v. Redman*, 295 U. S. 654, 657; *Galloway v. United States*, 319 U. S. 372, 390; *United States v. Wood*, 299 U. S. 123, 143; *Duffin v. Lucas*, 55 F. 2d 786, 799; *Dextone Co. v. Building Trades Council*, 60 F. 2d 47; *May Department Stores Co. v. Bell*, 61 F. 2d 830, 842; *Yellow Cab Co. v. Keane*, 93 F. 2d 290, 291; *Thompson v. Camp*, 167 F. 2d 733, 734; *Washington Gas Light Co. v. Connelly*, 214 F. 2d 254, 256; *Byrne v. Matczak*, 254 F. 2d 525, 528, and 529; *Cleary v. Indiana Beach, Inc.*, 275 F. 2d 543, 545.

The question of United's liability for the death of petitioners' decedents will turn on evidence, much of it highly technical, pertaining to the circumstances surrounding the collision. None of this evidence will relate in any way to the issue of the amount of damages suffered by the widow and children of a victim of the accident. The issues are totally unrelated. *Cf., Massackusetts Bonding & Insurance Company v. United States,* 352 U. S. 128, 132-3.

Petitioners submit that the decision below conflicts with the *Gasoline Products* case because the issues of liability and normal compensatory damages in these wrongful death cases are "clearly separable." The opinion of the court of appeals sets forth no circumstances—indeed there are none—suggesting that the trial judge's ruling, made in the exercise of his discretion, that separate trials can fairly be had on the issues of liability and compensatory damages is erroneous.

The court of appeals in its opinion below concerned itself almost exclusively with the separability of the issues of liability and exemplary damages. That question as pointed out above is not involved in this case. The only question here is whether the issue of liability may be tried before one jury and the amount of compensatory damages (to which issue the degree of United's culpability is immaterial) determined by another.

Petitioners submit that the court of appeals is in clear error on the separability of the issues of liability and normal compensatory damages.

II.

The Court of Appeals Has Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter.

The decision of the court of appeals below, that the issue of liability cannot be tried separately from the issue of damages, conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Nettles v. General Accident F. & L. Ins. Co.*, 234 F. 2d 243. The *Nettles* case involved three separate suits for personal injuries sustained in the same automobile accident. The court of appeals held that the trial court did not err in trying the issue of liability separately from the issue of damages.[5]

III.

The Court of Appeals' Decision Seriously and Erroneously Restricts a Proper Exercise of Discretion by the Trial Court; if Allowed to Stand, It Would Be Unfair to Petitioners and It Would Place Such a Heavy Burden on the District Court as to Call for an Exercise of This Court's Power of Supervision.

The trend of modern aviation toward larger and faster aircraft carries with it a modern species of civil litigation. Commercial air disasters, when they occur, usually give rise to civil actions with two distinguishing characteristics:

(1) Since most or all of the persons aboard are killed instantly, a large number of actions for wrong-

---

[5]Also see *Rickenbacher Transp. Co. v. Pennsylvania R. Co.*, 7 Fed. Rules Serv. 42b.12, case 1, in which the United States District Court for the Southern District of New York ordered the issue of liability determined and tried before the issue of damages in a truck and train collision case.

ful death arise out of identical facts on the issue of liability; and

(2) The issue of liability involves complex technical issues of fact as to the cause of the accident. It is estimated by experienced trial counsel that in the instant cases the trial on the issue of liability alone will take approximately three months.* Depositions of 34 persons have already been taken, most of them experts on technical aspects of aviation as related to the cause of the mid-air collision between the United DC-7 and the military jet. The deposition transcripts already taken total over 3,600 pages cumulatively.

It is important to the administration of justice in the United States District Courts to establish a fair and efficient procedure for handling litigation arising out of major air disasters. Because of the interstate pattern of commercial aviation, such cases can be expected to have the necessary diversity of citizenship for jurisdiction in the federal district courts. Significantly, all 23 cases involved in this petition have federal jurisdiction based upon diversity of citizenship as to defendant United Air Lines.

Petitioners submit that the district court's order of consolidation on the issue of liability offers the method of trying this complex litigation that is both fair to the parties and not unduly burdensome to the district

---

*The Chief Asst. U. S. Attorney in Los Angeles who has been representing the United States in these wrongful death actions has estimated that the trial on the issue of liability alone will take approximately 3 months. See Affidavit of Max F. Deutz transmitted to the Clerk of the United States Supreme Court together with this petition. Petitioners concur in this estimate.

court.[7] Significantly, the order of consolidation was made by the judicial officer having the primary responsibility for the trial as well as the most intimate knowledge of the problems involved.

One point stands out above all others. To try and retry the issue of liability over and over before different juries has nothing to recommend it from the standpoint of the administration of justice. Duplicating the trial on the facts of this mid-air collision, with all its technical ramifications, would impose an unreasonable and unnecessary burden on the court and the parties.

One way to avoid trying the issue of liability repeatedly would be to try before a single jury all 23 cases on both liability and damages. This alternative, which was rejected by the district court [R. 341-348, 352], has many disadvantages. Among them are:

(1) The burden upon a single jury would indeed be a heavy one. The trial on the issue of liability, with all its technical aspects, will require a jury with a high degree of comprehension. To add to this without interruption or break twenty-three individual trials on the issue of damages may increase the initial burden to the breaking point. The task of getting competent jurors to devote the required amount of continuous time may well prove insuperable.

---

[7]Note that the procedure of a single trial on liability, the result of which is binding in all cases, was used by agreement of the parties in the *Eastern Air Lines* cases that were before this Court in the 1955 Term. See *Eastern Air Lines v. Union Trust Co.*, 221 F. 2d 62, aff'd in part and rev'd in part, 350 U. S. 907.

(2) If a single jury is used, a department of the district court may be tied up for as long as three to five months without interruption, which could play havoc with the rest of the court's calendar.

(3) If there is a separate trial on the issue of liability, as ordered by the district court below, a break of, say, 60 to 120 days could follow the trial on liability. Such a break would serve two purposes: (a) Give the court a chance to handle other matters on its calendar, and (b) Give the parties an opportunity to consider and discuss settlement if plaintiffs prevail on the liability issue. It is reasonable to assume that all or a large number of the cases would be settled without a trial on damages if the parties have time to negotiate following a plaintiffs' verdict.

(4) A jury trying twenty-three separate damage cases—following a long involved trial on liability—would inevitably become confused as one set of facts on damages is piled upon another. It is likely that, from exhaustion, confusion or boredom, the jury would begin assessing damages automatically and mechanically without giving each case its proper consideration. Moreover, a jury of twelve average citizens very well might be influenced toward reducing each verdict as the jurors became conscious that their total awards climbed into million dollar figures. In short, it would be prejudicial to the plaintiffs to have a single jury try all twenty-three of their cases on the issue of damages.

(5) The problem of selecting a jury to handle twenty-three separate cases of damages is far different from the problem of selecting a jury to consider the single issue of liability. The reasons why counsel would want to challenge jurors, either for cause or peremptorily, differ from case to case.

By contrast with the procedure for a single jury for all issues, a single trial on liability and separate trials on damages would combine fairness to the parties with a minimum of burden on the district court. United Air Lines could not be prejudiced if a jury assesses damages without evidence before it on the issue of liability. Liability and compensatory damages are unrelated issues. Indeed, it would be improper for a jury to consider the degree of United's culpability in fixing damages.

Professor Moore argues in favor of the procedure which the district court wanted to follow below:

> "A separate trial may, of course, be granted as to a particular issue, where appropriate, even though it does not amount to a 'claim' or 'defense'. A separate trial may properly be ordered on the issue of the defendant's liability to respond in damages, particularly where plaintiff's proof of damages would involve the testimony of a large number of persons. (Footnote omitted.) This procedure has been privately recommended by a number of members of the judiciary as a means of expediting trials and of saving time and expense.

> We have found no reason why this procedure, which is authorized by Rule 42b should not be more extensively employed."
>
> 5 Moore's Federal Practice (2d Ed.), p. 1217.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

FRANK B. BELCHER,
510 South Spring Street,
Los Angeles 13, California,

BEN MARGOLIS,
3175 West Sixth Street,
Los Angeles 5, California,

WILLIAM A. NORRIS,
411 West Fifth Street,
Los Angeles 13, California,

By FRANK B. BELCHER,
Attorneys for Petitioners.

Of Counsel:

BARRICK, POOLE & OLSON,
for the Plaintiff Charles Leo Rachford,

JAMES A. WITHERS, ALGERDAS CHELEDEN and
ANTHONY BRADISSE,
for the Plaintiff Isabelle Larava, et al.,

JACK DUNAWAY,
for the Plaintiff Leona Mae Petrie,

TUTTLE & TAYLOR and
FRANCIS J. GARVEY,
for the Plaintiffs Helen A. Friedel, et al.,

HAROLD R. SPENCE and
AUGUSTUS F. MACK,
for the Plaintiffs S. Rush Bailey, III, et al.,

SAMUEL A. MILLER and
NORMAN PITTLUCK,
for the Plaintiffs Carol U. Aaronson, et al.,

JOHNSON & LADENBERGER,
for the Plaintiff Martha H. Kallenbaugh,

STEPHEN J. GROGAN,
for the Plaintiff Daisy R. Fedrick,

BELCHER, HENZIE & FARGO,
for the Plaintiffs Ruth E. Simmons, Ethyl E. Kean, Hazel N. McKinney, Donald G. Rhoades, Margaret K. Rankin, Alice L. Hight and Mary A. Parsons,

JOSEPH C. LAVELLE,
for the Plaintiffs Stephen Emanuel, etc., et al.,

OLIVER, GOOD & SLOAN,
for the Plaintiffs Max Daufman, Raymond S. Lipson and Arlo W. Munch,

BERTRAND RHINE and
GEORGE H. PRATT,
for the Plaintiffs Inez O'Brien Kay and Claude O'Brien,

RICHARD MCLEOD and
JOHN C. GREGORY,
for the Plaintiff Dorothy M. Weil,

PASTOR & ZIPSER,
for the Plaintiff Edith Wagner,

MARGOLIS & MCTERNAN,
for the Plaintiff Janice Wiener, etc.

APPENDIX "A".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United Air Lines, Inc., Appellant, vs. Janice Wiener, as Executrix of the Estate of Norton Wiener, Deceased, and Related Cases, Appellees. No. 16,860. Jan. 16, 1961.

Appeal from the United States District Court for the Southern District of California, Central Division, Pursuan to 28 U. S. C. 1292(b).

Before: Hamlin and Jertberg, Circuit Judges, and Walsh, District Judge.

Hamlin, Circuit Judge.

On April 21, 1958, near Las Vegas, Nevada, there was a mid-air collision between an airplane owned and operated by the United States of America and a passenger plane owned and operated by United Airlines, herein referred to as United. All persons in each airplane were killed in the collision. Twenty-three actions for damages against United and the United States were filed in the United States District Court for the Southern District of California, Central Division, by the heirs or personal representatives of the persons killed in the collision.

After the twenty-three cases were at issue, the United States made a motion in the district court asking that all cases be consolidated on the issue of liability only. At a hearing upon this motion United indicated that it did not object to consolidation on the issue of liability,

as long as this consolidation did not mean that the issue of damages would be tried before a different jury in the event that United was found to be liable. An order was submitted by the United States providing for the consolidation, but this proposed order was silent concerning whether the same jury would determine the issue of damages if that issue should be reached. United then filed its own motion, asking that in the event the cases were consolidated for any purpose they be consolidated for trial on all issues before the same jury. After a further hearing the district court signed an order which provided *inter alia* as follows:

> (1) That all of the above-entitled cases be consolidated on the issue of liability only, . . .
>
> (2) That all of the above-entitled cases, so consolidated, shall be jointly tried in a separate trial as to liability only, and
>
> (3) That the question of damages, if any, as to the plaintiffs in each of the above-entitled cases shall be tried separately, by separate juries where demanded, unless waived, unless one or more of said plaintiffs consent to a consolidation for trial on that issue, . . .

Included in the court's order was the following statement:

> ". . . the court is of the opinion that this Order involves a controlling question of law, as defined in 28 U. S. C. A. 1292(b), as to which there is a substantial ground for differences of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of the litigation."

After obtaining permission to do so, United timely appealed to this court from the above order.

Jurisdiction in the district court against United is based upon diversity of citizenship, 28 U. S. C. A. §1332, and against the United States of America upon the Federal Tort Claims Act, 28 U. S. C. A. §1346(b). Jurisdiction in this court is based upon 28 U. S. C. A. §1292(b).

The appellees contend that the order of the district court is proper under rule 42(b) of the Fed. Rules Civ. Proc. which reads as follows:

> "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

The appellant points out that there are no express words in this rule permitting separate trials before separate juries on separate issues, and asserts that the procedure the rule contemplates is the completion of the trial upon a particular issue prior to the trial of another issue by the same trier of fact. It then contends that if the rule is given the interpretation advocated by the appellees, it is violative of the Seventh Amendment to the Constitution of the United States.[1] Appellant contends that the right to a trial by jury as guaranteed by the Seventh Amendment has been held to mean "the

---

[1] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

right to trial by jury as it existed by common law at the time of the adoption of the Seventh Amendment" and cites Dimick v. Schiedt, 293 U. S. 474 (1935), as authority for its position. It asserts that the procedure of having trials of separate issues in the same case by separate juries was not known to the common law.

We have been cited no case by either appellant or appellees which either approves or disapproves the exact procedure provided for in the order of the district court. Each party refers to Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U. S. 494 (1931), contending that either the language or the holding of that case lends support to his contention. In that case, after a trial in the district court of a contract action, the Court of Appeals for the First Circuit reversed the judgment because of errors in the charge of the trial court with respect to the measure of damages on the counterclaim. But in reversing, the court restricted the new trial to the determination of damages only. The Supreme Court granted certiorari to review the single question of whether the court of appeals erred in thus limiting the new trial. The Court discussed the provisions of the Seventh Amendment and stated:

> "It is true that at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all."[2]

After discussing modification of this rule in certain states, the Court said:

> "Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue,

[2] 283 U.S. at 497.

was erroneous as to another, said: '. . . for form's sake, we must set aside the whole verdict . . .' Edie v. East India Co., 1 W.Bl. 295, 298. But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. See Herron v. Southern Pacific Co., ante, p. 91. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. See Walker v. Southern Pacific R. Co., 165 U. S. 593, 596. It does not prohibit the introduction of new methods for ascertaining what facts are in issue, see *Ex parte* Peterson, 253 U. S. 300, 309, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury."[3]

* * * * *

"Here we hold that where the requirement of a jury trial has been satisfied by verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."[4]

---

[3]283 U.S. at 498.
[4]Id. at 499.

The court, however, then went on to consider the facts of the particular case, and stated:

> "But the question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried. The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize the damages."[5]
>
> * * * * *
>
> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. There should be a new trial of all the issues raised by the counterclaim." [Citations omitted.][6]

A consideration of the issues in the instant cases reveals a similar situation. An examination of the claims made in each of the twenty-three complaints shows the

---

[5]Ibid.

[6]Id. at 500.

following facts. Each complaint alleges that both United and the United States of America were negligent. In five of the cases United is charged with recklessness in addition to the usual charge of negligence and carelessness. In three of the cases the plaintiffs demand exemplary damages. In eight of the cases sections of the Nevada Revised Statutes that provide for exemplary damages are set out in the complaints. All of the other cases refer to one or the other of the Nevada statutes which have the exemplary damage provisions. In each of the answers filed by United the ownership and operation of the plane and the collision and the death of the decedent in question is admitted. In all except one it was admitted that the decedent was a passenger for hire. All denied the allegations of negligence, carelessness, recklessness, wantonness, or willfulness.[7]

It is apparent that where parties are asking for exemplary damages which depend upon the degree of culpability of the defendant, they are required to establish by their evidence their contentions as to the degree of negligence. Likewise, the defendant is entitled to show all of the facts surrounding the collision in order to establish, if he can, first, that there was no negligence and second, that even if there was negligence there was no willfulness or wantonness or extreme recklessness.

We do not say that in no circumstances can a separate jury determine the issue of damages after another

---

[7]In one action where there is a mere allegation of negligence counsel apparently believes that exemplary damages may be recovered because they are demanded in the prayer without any allegation as to United's conduct other than negligence and carelessness.

jury has determined the issue of liability, for we do not reach that question in this case. As was said in a recent case from the seventh Circuit, "Whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some of the issues are submitted to one jury and other issues to a second jury, is a more difficult question to resolve." Hosie v. Chicago & Northwestern Ry., 282 F. 2d 639, 642 (7 Cir. 1960). We do hold that under the circumstances presented by this appeal the issues of liability and damages, exemplary or normal, are not so distinct and separable that a separate trial of the damage issues my be had without injustice. The question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial. Gasoline Products Co., Inc. v. Champlin Co., *supra*.

The order of the district court is reversed.

(Endorsed) Opinion Filed Jan. 16, 1961.

Frank H. Schmid, Clerk.

State of California—ss.
County of Los Angeles.

Max F. Deutz, being first duly sworn, deposes and says:

That he is Chief Assistant U. S. Attorney for the Southern District of California and has been designated as Chief Trial Counsel in the Las Vegas Plane Crash Litigation, including the case of Janice Wiener, et al. v United States, et al., Civil No. 469-58 PH.

That he is thoroughly familiar with the nature of this litigation and has been the primary participant in the depositions taken in these cases;

That there are approximately 3,600 pages of deposition transcript, most of which it is anticipated will be read into the record at the time of trial;

That it is this affiant's best estimate that, considering the amount of depositions to be used at trial and the fact that additional fact and expert witnesses will be called to testify, it will require approximately three months of trial time to complete the trial on the issues of liability alone.

MAX F. DEUTZ.

Sworn to and subscribed before me this 24th day of March, 1961.

LOIS M. PARKINSON,
Notary Public in and for said County and State.

My Commission expires Feb. 24, 1965.